

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL D. MONTGOMERY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CASE NO. 15-cv-5161 RJB

11-cr-5156 RJB

ORDER OF TRANSFER

This matter comes before the Court on Mr. Montgomery's "Motion to Dismiss Plea based on Rule 59(e)." Dkt. 1. The Court has reviewed the relevant documents and the file herein.

Mr. Montgomery seeks relief from his 60 month sentence imposed after his 2012 guilty plea to one count of tax fraud and one count of wire fraud in the underlying criminal case, *United States v. Montgomery*, Western District of Washington case 11-5156 RJB. Dkt. 1.

On December 12, 2013, he filed his first Motion under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence. *United States v. Montgomery*, Western District of Washington case 11-5156 RJB, Dkt. 98 and *Montgomery v. United States*, Western District of Washington case

1 13-6059 RJB, Dkt. 1. The motion was denied with prejudice on February 6, 2014. *United States*
2 *v. Montgomery*, Western District of Washington case 11-5156 RJB, Dkt. 100 and *Montgomery v.*
3 *United States*, Western District of Washington case 13-6059 RJB, Dkt. 11.

4 On April 14, 2014, Mr. Montgomery filed a pleading challenging this Court's jurisdiction
5 to hear the underlying criminal case and arguing that his punishment should be "reversed."
6 *United States v. Montgomery*, Western District of Washington case 11-5156 RJB Dkt. 101. Case
7 *Montgomery v. United States*, Western District of Washington case 14-5314 RJB was opened,
8 and the petition was transferred to the Ninth Circuit Court of Appeals as a successive 28 U.S.C. §
9 2255 petition.

10 In Petitioner's current pleading, "Motion to Dismiss Plea based on Rule 59(e)," he argues
11 that his convictions should be vacated because of a "procedural error in acceptance of a felony
12 guilty plea by a non Article III Magistrate Judge." Dkt. 1.

13 This motion should be construed as a motion under 28 U.S.C. § 2255 because Mr.
14 Montgomery again is challenging the validity of his conviction. Mr. Montgomery previously
15 filed a § 2255 motion, and it was dismissed with prejudice. Thus, this motion is a successive 28
16 U.S.C. § 2255 motion. Any prisoner seeking to file a successive § 2255 motion must first file, in
17 the appropriate court of appeals, a motion for an order authorizing the district court to consider
18 the successive application. 28 U.S.C. § 2255; 28 U.S.C. § 2244(b)(3)(A). Accordingly, this Court
19 is without jurisdiction to consider Petitioner's motion unless and until the Ninth Circuit Court of
20 Appeals has authorized its filing.

21 Therefore, this case is hereby:

22 **TRANSFERRED** to the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631
23 and Ninth Circuit Rule 22-3. Petitioner is advised that this transfer does not of itself constitute
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1 compliance with § 2244(b)(3)(A) and Ninth Circuit Rule 22-3. Petitioner must still file a motion
2 for leave to proceed in the Court of Appeals and make the showing required by § 2255(h).

3 The Clerk is directed to close this case and to transfer it to the Ninth Circuit Court of
4 Appeals. The Clerk is further directed to send a copy of this Order to all counsel of record and to
5 any party appearing *pro se* at said party's last known address.

6 Dated this 23rd day of March, 2015.

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9 ROBERT J. BRYAN
10 United States District Judge
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